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NO. 85-899

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1985

STATE OF CONNECTICUT,
*Petitioner,*

V.

WILLIAM BARRETT,
*Respondent.*

On Writ of Certiorari to the
Supreme Court of the State of Connecticut

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## BRIEF OF AMICI CURIAE, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, IDAHO, INDIANA, KENTUCKY, LOUISIANA, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, NORTH CAROLINA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, VIRGINIA, WASHINGTON, AND WISCONSIN*

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# BRIEF OF AMICI CURIAE

## INTEREST OF AMICI CURIAE

Amici curiae are states, each of which has an interest in the present case because of its effect upon the consistent enforcement of the criminal law. When officers are prevented from discussing alleged offenses in a noncoercive manner with willing suspects, the result is that proper criminal investigation is discouraged. Particularly when, as in this case, suspects protesting their innocence indicate willingness to speak with officers to demonstrate that they should be released, the result could even be that the release of innocent suspects would be delayed or impeded. Furthermore, the exclusion of evidence in the form of voluntary and uncoerced statements of a suspect brings the criminal justice system into public disrespect. Amici urge the Court to reverse the decision below and to clarify its previous decision in *Edwards v. Arizona*, 451 U.S. 477 (1981), to prevent these results.

## SUMMARY OF ARGUMENT

The defendant in this case spontaneously and voluntarily defined the kind of discussions he wanted to hold with the offi-

cers in question. The evidence leaves no question that he understood his rights and quite deliberately discussed the case with officers because he wanted to argue his innocence. His declaration that he would not sign a written statement without an attorney shows that he was fully able to assert his right to counsel as well as his right to withhold any statement. In characterizing this evidence as showing coercion, the Connecticut Supreme Court had it backwards; instead, the evidence convincingly shows voluntariness.

The decision below resulted from a confused interpretation of *Edwards v. Arizona*. The focus, under *Edwards*, should not be solely upon who initiated discussions or solely upon whether the defendant mentioned the word "attorney;" it should also concern itself with whether the officers somehow overrode defendant's conscious will by coercive questioning or badgering. The consistent thread that runs through *Edwards* and all of its progeny is a focus upon whether there was persistent questioning that overrode the suspect's will. In this case, the officers did nothing to override the defendant's will, did nothing coercive, and did nothing that could conceivably be characterized as badgering. In the absence of compulsion of any kind by the officers, there can be no fifth amendment violation, and *Edwards* is not to the contrary.

The Court should take this opportunity to clarify *Edwards* and to state that the *Edwards* inquiry cannot be reduced to any one single factor to the exclusion of all others. The admittance of the defendant's statement in this case is fully consistent with *Edwards*, but confusion over interpretations of the *Edwards* holding has produced anomalous results in this case and in others. There is conflict in this Court's decisions concerning the "bright line" or "per se" nature of the *Edwards* holding, and there is even more confusion concerning the factors to be considered in deciding whether and how to apply a "bright line" approach if one is to be used.

Holdings such as that of the Connecticut Supreme Court in this case are not merely confused, they are counterproductive. It is inappropriate to tell officers, as the Connecticut court did,

that they may not discuss charges with a suspect who speaks willingly and who protests his innocence. Demonstrations of innocence by arrested suspects can readily speed their release. In fact, if an officer refuses to listen to a suspect's protestations of innocence and merely returns him to a cell (as the Connecticut court evidently concluded these officers should have done), he might very well be vulnerable to suit under 28 U.S.C. sec. 1983. In any event, law enforcement officers should not be required or encouraged to adopt this behavior, because it presents an unacceptable risk that incarceration of factually innocent suspects may be unnecessarily prolonged.

## ARGUMENT AND AUTHORITIES

### I. THE FOCUS, IN AN *EDWARDS V. ARIZONA* INQUIRY, SHOULD NOT BE SOLELY UPON WHO INITIATED DISCUSSIONS OR UPON WHETHER DEFENDANT EQUIVOCALLY MENTIONED COUNSEL, BUT SHOULD ALSO CONCERN ITSELF WITH WHETHER LAW ENFORCEMENT OFFICERS OVERRODE DEFENDANT'S CONSCIOUS WILL BY COERCIVE QUESTIONING OR BADGERING.

### *A. It is a Misinterpretation of Edwards to Hold, as Did the Court Below, That a Suspect Who Has Spontaneously and Voluntarily Defined the Kind of Discussions He Desires to Undertake With Law Enforcement Officers, Has Been "Compelled . . . to Be a Witness Against Himself."*

Misinterpretation of *Edwards v. Arizona* can easily lead to irrational results. The decision of the Connecticut Supreme Court in the present case is an example.

In this case, the Defendant clearly and unequivocally indicated that although he would not sign a written statement without an attorney, he was fully willing to discuss the alleged offense with officers orally. (In fact, defendant clearly desired to make these statements, which after all were designed to exonerate him and secure his release.) When a defendant, him-

self, has voluntarily and spontaneously structured the method of communication he wishes to undertake with law enforcement officers, and has exercised his voluntary, conscious will to distinguish between different kinds of communication, his conduct is not evidence that he has been "compelled . . . to be a witness against himself" within the meaning of the fifth amendment. Instead, it is evidence of voluntariness.

The topsy-turvy nature of the Connecticut Supreme Court's reasoning is shown by its references to Defendant's mention of an attorney. Defendant's reference to his right to counsel was not evidence that he was psychologically "coerced" into making a statement; instead, it was evidence of his awareness of the right. *Cf. Wyrick v. Fields*, 103 S. Ct. 394 (1982) (fact that defendant not only had invoked his right to counsel, but actually had retained counsel, should be taken into account in determining that defendant "understood that right and was aware of his power to stop questioning at any time or to speak to an attorney at any time"). Furthermore, Defendant Barrett's actual exercise of his right not to give a certain kind of statement (i.e., a written statement) is not an indication that his oral statements were "compelled." Instead, as in *Wyrick*, it was strong evidence that he understood his right to terminate or withhold any kind of statement and that his suggestion of oral discussions was voluntary.

Finally, the Connecticut Supreme Court's labeling of Defendant's reference to an attorney as "equivocal" is at odds with reality. Defendant's statement, that he would talk orally but would not sign a written statement, was not "equivocal" at all. With crystalline clarity, Defendant indicated that he understood and was invoking his right not to make a written statement until he had an attorney, but was willing to make an oral statement without an attorney. Again, Defendant's behavior is evidence not of compulsion, but of understanding, voluntariness, noncoercion, and the exercise of conscious will.

Indeed, it would be ironic if this Defendant's statement were excluded merely because he mentioned an attorney in another context while giving his waiver with respect to oral state-

ments, while the statement of another defendant might be admitted, merely because he did not furnish the same evidence that he was aware of and able to invoke his rights. The Connecticut Supreme Court perceived what is actually evidence of voluntariness as evidence of coercion. The Connecticut court reached this backwards result by focusing solely upon a superficial view of two factors (the mention of the word "attorney" and the locus of initiation of conversations) to the exclusion of other, more significant factors.

This unrealistic reasoning, in turn, was the product of the Connecticut court's confused understanding of *Edwards v. Arizona*. This Court should take this opportunity to clarify *Edwards* and to indicate that the decision does not require a court to isolate any single factor, or to insulate itself from considering all other relevant factors, when inquiring into voluntariness.

*B. A Focus Solely Upon Whether Reference to Counsel Was "Equivocal," or Upon the Locus of "Initiation" of Discussions by a Suspect With Law Enforcement Officers, Would Produce Inconsistent and Misleading Results, if It Excluded Other Factors That Sometimes Are More Determinative.*

Imagine a suspect who is given *Miranda* warnings, and who immediately says: "I don't think I want an attorney, and I want to waive my rights." He then proceeds to give a detailed statement of the circumstances of his offense, not prompted by any police questioning. This confession would not be "involuntary." However, the Connecticut Court's approach would label the suspect's statement, "I don't *think* I want an attorney," as equivocal, and it would presumably result in the irrational exclusion of this evidence.

Determining whether a suspect's mention of counsel was "equivocal" is itself an ambiguous process. Indeed, in the present case, it is respectfully submitted that defendant's waiver of counsel in giving an oral statement was not equivocal at all; instead, it was as nearly as unequivocal as it is to be found in these circumstances. If the suspect were to say, "I guess I don't

need an attorney;" or even "I don't suppose an attorney would really do me any good," each of these remarks arguably would be equivocal, but it would make no sense to decide the voluntariness of his subsequent statements without considering any other factor. Neither *Edwards v. Arizona*, 451 U.S. 477 (1981), nor any of this Court's decisions following it, requires such a straightjacketed approach.

Similarly, a narrow inquiry into which party "initiated" discussions, excluding other factors, would be inappropriate. In the present case, for example, the Defendant mentioned his right to counsel in connection with written statements, but the Defendant then "initiated" oral discussions with the officers by indicating, quite clearly, that he was willing to talk with them. The Connecticut Supreme Court ignored this actual initiation of the discussions by the suspect, and this distorted reasoning exemplifies the confusion that can be produced by an effort to isolate the "initiation" factor. In none of the cases, *Edwards v. Arizona* or its progeny, has this Court ever held that the "initiation" factor must be considered in isolation.

In fact, the Defendant's mention of counsel (whether equivocal or unequivocal), and the question of who initiated discussions, are relevant not solely for their own sake, but because they may bear upon the question whether law enforcement officers have overridden the defendant's conscious will so as to "compel" him to be a witness against himself. In all of this Court's decisions following *Edwards*, the true focus has been upon the presence or absence of coercive questioning by law enforcement officers. The Defendant's mention of counsel on the one hand, or initiation of discussions on the other, is relevant because it provides the context in which police conduct is to be considered. If the suspect says that he wants to speak solely through an attorney, but officers ignore that statement and persist in badgering him with questions, their behavior is likely to be found coercive. This description, however, does not fit the present case at all, since there was no coercive questioning.

*C. The Consistent Thread in Edwards v. Arizona and All Its Progeny is a Focus Upon Whether Law Enforcement*

*Officers Overrode Defendant's Efforts to Invoke the Fifth Amendment by Badgering or Coercive Questioning.*

*Edwards v. Arizona, supra,* is completely different from the present case. In *Edwards*, the defendant demanded an attorney, whereupon questioning ceased. The next morning, he was told that he "had to" talk to detectives, even though he had said that "he did not want to talk to anyone." This Court said:

> [W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation . . . . we further hold that an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation . . . unless the accused himself initiates further communication . . . .

451 U.S. at 484-85. The gist of *Edwards*, in other words, is that even though the defendant had indicated that he did not want to talk to police except through counsel, and even though he had further stated that he did not want to talk "to anyone," the officers overrode these clearly expressed desires and engaged in coercive questioning, or badgering, of the suspect.

In the present case there is no relationship to those circumstances. This Defendant, Barrett, never "invoked his right to have counsel present during custodial interrogation," as in *Edwards*, 451 U.S. at 477. Certainly, he never "expressed his desire to deal with the police only through counsel." On the contrary, he voluntarily and spontaneously indicated that he affirmatively was willing to deal with these officers by orally discussing the alleged offense with them. Furthermore, no one told Barrett that he "had to" talk to anyone. Defendant was never badgered, Defendant was never coerced, and there is no basis whatsoever for stating that Defendant was "compelled to be a witness against himself."

The consistent thread that runs through *Edwards* and all of its progeny, including *Smith v. Illinois*, 105 S. Ct. 490 (1984); *Solem v. Stumes*, 104 S. Ct. 1338 (1984); *Oregon v. Bradshaw*, 103 S. Ct. 2830 (1983); and *Wyrick v. Fields*, *supra*, is a focus upon the presence or absence of persistent, badgering police questioning that has overridden expressed desires of the suspect and arguably overcome the suspect's conscious will. In *Smith v. Illinois*, the suspect repeatedly told officers that he would like to have a lawyer present during questioning; the officers continued to interrogate him, and stated that he would "have to talk to me [the interrogator] this time without a lawyer being present . . . ." In *Solem v. Stumes*, *supra*, the defendant on two occasions stated that he would "rather not" talk about the subject any further "until I talk to [my attorney]." The Court's implicit finding of an *Edwards* violation was based upon the officer's continued questioning, which each time was resumed, overriding the defendant's clear statement that he did not want to talk at all. 104 S. Ct. at 1340-41. In *Wyrick v. Fields*, 103 S. Ct. 396-97, the Court reached the opposite result because the officers never overrode the conscious will of the suspect, who knew that he could terminate questioning at any time and request that his lawyer join him; the police questioning, said the Court, was "reasonable." Finally, in *Oregon v. Bradshaw*, 103 S. Ct. at 2835, the Court emphasized the lower court's finding "that the police made no threats, promises or inducements to talk," and that the defendant talked "without any impropriety on the part of the police." In summary, in every case,[1] the *Edwards* inquiry focused not solely upon the suspect's mention of the word "attorney" or initiation of discussions, but additionally—indeed, primarily—upon whether there was police badgering or other tactics that overrode defendant's expressed desires not to talk. That improper behavior is utterly absent in this case.

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1 *Michigan v. Jackson*, 106 S. Ct. 1404 (1986), is related to this line of cases, but presented a different issue. As a post-indictment case, it involved a pending formal accusation rather than a mere investigation, and more importantly, since the defendant actually had obtained counsel, the Court indicated that the circumstances made a different, and stronger, case for suppression.

It is unclear whether *Edwards* creates a "per se" rule. The cases make inconsistent statements. *E.g.*, *Wyrick*, 103 S. Ct. at 396 (examination of "totality of the circumstances" required by *Edwards*; Court criticized lower court for having "regarded [*Edwards*] as a *per se* rule"); *Bradshaw*, 103 S. Ct. 2835 ("ambiguous" actions of suspect invoked "totality of the circumstances" test, including focus on lack of police inducements); *Solem*, 104 S. Ct. at 1344 (*Edwards* "established a bright-line rule," but "it does not in any way cast doubt on . . . . *Edwards* to acknowledge that in some cases a waiver could be [valid] even though it occurred when the police recommenced questioning after an accused had invoked the right to counsel"); *Smith*, 105 S. Ct. at 494-495 ("bright-line rule;" but decision "is a narrow one," and does not address "ambiguous or equivocal" requests for counsel as a "result of events preceding the request or of nuances inherent in the request itself").

The weight of the better reasoning in the cases does not indicate a per se rule.[2] However, whether per se or not, the cases clearly do not require the invalidation of voluntary statements given without police badgering, ignoring requests to stop questioning, statements that the accused "had to" talk, or other conduct that overrode the suspect's will. Absent this kind of improper police questioning, there cannot be any violation of *Edwards*.

Defendant Barrett's approach to these issues is a "magic words" approach. That approach is inappropriate because the inquiry is ultimately whether he was "compelled" to be a witness against himself. The inquiry is therefore whether his conscious will was overcome by coercion. In *Oregon v. Elstad*, 105 S. Ct. 1285, 1295 (1985), the Court said: "There is vast difference between the direct consequences flowing from coercion of a confession by . . . deliberate means calculated to break the

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2 In addition, since these decisions, this Court has cited with approval the concurrence of Justice Powell in *Edwards*. The cited passage is to the effect that *Edwards* should *not* be considered a per se rule. *See infra* note 3 and accompanying text.

suspect's will and [noncoercive communication] . . . ." "The fifth amendment, of course, is not concerned . . . with moral and psychological pressures to confess emanating from sources other than official coercion." *Id.* at 1291. In both *Elstad*, 105 S. Ct. at 1291, and *New York v. Quarles*, 104 S. Ct. 2626 (1984), the Court cited a passage from Justice Powell's concurrence in *Edwards v. Arizona* that includes the following:

> 'Waiver has always been evaluated under the general formulation of the *Zerbst* [*Johnson v. Zerbst*, 304 U.S. 458 (1938)] standard . . . . My concern is that the Court's opinion [in *Edwards*] today may be read as "constitutionalizing" not the general *Zerbst* standard but a *single element of fact* among the various facts that may be relevant to determining whether there has been a valid waiver.

451 U.S. at 492 (emphasis in original).[3] The citation of this passage in *Elstad* and *Quarles* shows the error in Defendant's "magic words" approach, and indicates that the Court has not taken a per se approach to *Edwards*.

This Court has repeatedly indicated that, in the absence of improper police conduct, confessions to law enforcement officers are not invalid. *E.g.*, *Moran v. Burbine*, 106 S. Ct. 1135 (1986) ("once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements . . . , the analysis is complete and the waiver is valid as a matter of law"). There can be no *Edwards* violation if the officers have avoided engaging in any coercive questioning, which they absolutely avoided in this case.

## II. WHEN A SUSPECT PROTESTS HIS INNOCENCE, LAW ENFORCEMENT OFFICERS

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3 See *supra* note 2.

**SHOULD NOT BE PROHIBITED FROM DISCUSSING THAT SUBJECT WITH HIM. IN FACT, SUCH A PROHIBITION WOULD DO SUBSTANTIAL HARM TO INNOCENT PERSONS WHO ARE ARRESTED.**

A. *If Officers Were Prohibited From Participating in Noncoercive Discussions With a Suspect Who Willingly Speaks to Protest His Innocence, Merely Because of His Mention of the Word "Attorney," They Would Create an Unacceptable Risk of Holding Innocent Persons Whom They Should Release.*

Actually, the Defendant in this case wished to speak with the officers because he wanted to protest his innocence. The holding of the court below, however, was that at the mere mention of the word attorney, the officers should have ceased all discussions with him and, presumably, should have returned him to his cell. This conduct would have been inappropriate for the officers, who should not have terminated discussions with a suspect who professed his innocence, and, further, indicated that he wished to talk to police officers to show them he was innocent.

There is a substantial percentage of arrests that do not result in prosecution. It is not unusual for a suspect to be released because further investigation indicates his innocence (or at least produces sufficiently ambiguous evidence that prosecution is not justified). An arrestee can often contribute to the investigation that will remove the charges against him even if he has been arrested on probable cause, and he may be able to hasten his release by providing information showing his nonculpability. Yet by requiring that these officers cease all discussions with the accused in this case upon the mere mention of the word "attorney," the lower court created conditions that would, if upheld, require precisely this behavior of police officers.

It is likely that the officers in this case thought the balance of probabilities favored the suspect's guilt. However, an officer

learns from slight experience that he should continue to investigate the possibility of innocence even if initial leads show apparent guilt. It simply is not unusual for initial suspicion of guilt to prove inaccurate. *See, e.g.*, D. Crump & G. Jacobs, *Capital Murder* (1967) (reporting investigations of six homicide cases; in two of the six, initial positive identifications of suspects taken into custody were revealed to be based upon misidentifications; information provided to officers by the suspects themselves convincingly showed their innocence, and their voluntary statements led in both cases to their prompt release.) In several of the cases following *Edwards*, the statements at issue resulted because the officers were investigating claims of innocence by the defendants. *E.g., Solem v. Stumes, supra* (defendant denied involvement in homicide and was asked to take polygraph); *Wyrick v. Fields, supra* (defendant actually took polygraph examination on advice of counsel); and, of course, the present case.

This Court sees the results of these investigations only when the suspect is later convicted. It cannot know how many thousands of individuals every year are arrested on probable cause but later released as a result of discussions with officers just like those conducted by defendant in this case. The Court should not adopt a rule that would prevent that result.

*B. The Law Enforcement Behavior Required by the Connecticut Supreme Court Could Amount to the Deprivation of a Factually Innocent Suspect's Civil Rights.*

If police officers followed the opinion below, their behavior very well could subject them, personally, to damage liability to individuals wrongfully retained in custody. This suspect said, in effect, "I won't sign a statement without an attorney, but I do want to talk to you orally about the offense, and I want to demonstrate to you that I am innocent and should be released." The court below held that the officers should have terminated the interview upon receiving this message. If they had refused to discuss the matter with the suspect, and if they terminated interviews in these circumstances routinely, the officers would incur an unacceptable risk that they would hold an innocent

person because of their own intentional failure to receive evidence demonstrating his innocence. It would not be surprising if an innocent suspect, who had been held in jail for these reasons, sued the officers pursuant to 42 U.S.C. sec. 1983 for denying him the due process of law.

It may be that an officer sued under these circumstances would be able to defend on grounds that he had not violated the Constitution or had acted in good faith, but the outcome remains ambiguous. *Cf. Malley v. Briggs*, 106 S. Ct. 1092 (1986) (officers may be liable for unlawful search even though their search was ordered by a court in a warrant). In any event, as a matter of policy, officers should not be prohibited from discussing with suspects their protestations of innocence, provided they do not engage in coercion or override a suspect's request "to speak only through counsel."

## CONCLUSION

The judgment of the Supreme Court of the State of Connecticut should be reversed.

Respectfully submitted,

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